TOPICAL INDEX

	Page
Opening Statement	1
I. This Case Involves Important Questions of Law of Nationwide Impact	7
II. This Court Has Jurisdiction To Review the Holding of the State Supreme Court	12
III. The Fifty-Four Day Close of Registration Is Necessitated By A Compelling State Interest	14
IV. The Hight To Vote Is Not Denied To Those Who Reside in the Precinct More Than Fifty-Four Days But Who Fail To Register	17

TABLE OF CASES AND AUTHORITIES CITED

Cases

Alabama State Federation of Labor v. McAdory (1944) 325 U.S. 450 16

Alhambra City School District v. Mize (1970) 2 Cal. 3d 806, 87 Cal. Rptr. 867, 471 P.2d 515 12

Blue v. State (1934) 206 Ind. 98, 188 N.E. 583 18

Dunn v. Blumstein (1972) 405 U.S. 330 7

Gordon v. Lance (1970) 403 U.S. 1 13

Mihaly v. Westbrook (1971) 403 U.S. 915 13

Mize v. Alhambra City School District (1971) 403 U.S. 927 13

Westbrook v. Mihaly (1970) 2 Cal. 3d 765, 87 Cal. Rptr. 839, 471 P.2d 487 12

Authorities

	Page
Constitution of the State of California,	
Section 1 of Article II	3, 7, 16, 17
Section 10 of Article VI	4
Section 40 of Article XIII	13
Code of Civil Procedure Section 1085	4
Elections Code,	
Section 201	18
Section 202	18, 19
Section 203	1, 4, 5, 7, 17, 18, 22
Section 204	18, 20
Section 205.5	18, 20
Section 213	18, 20
Section 213.1	18, 21
Section 223	18, 21
Section 6403	5
28 U.S.C. §1257	2

IN THE

Supreme Court of the United States

October Term, 1972

No.

GEORGE H. GNOSS, County Clerk of the County of Marin, and ERNEST A. MAGGINI, County Clerk of the County of Monterey, *Petitioners,* vs. JEFFREY A. YOUNG, ERNESTINE E. ISAAC, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, MEXICAN POLITICAL ASSOCIATION and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (Western Region), *Respondents.*	No. S.F. 22888

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPENING STATEMENT

In this petition for writ of certiorai we seek review of the decision of the Supreme Court of California that Section 203 of the Elections Code of the State of California which closes registration fifty-four days before an election is unconstitutional insofar as it requires registration to close more than tweny-nine days before an election.

(a) The opinion of the Supreme Court of the State of California is appended to this petition as provided

in subparagraph (i) of paragraph 1 of Rule 23 and is reported in 7 Cal.3d 18, 101 Cal.Rptr. 533, 496 P.2d 445.

(b) *Grounds upon Which Certiorari is Sought.*

(i) The case was decided by the opinion filed on May 4, 1972, and was entered on that date.

(ii) There has been no petition for, or orders concerning, a rehearing or extension of time in which to seek certiorari in this case.

(iii) We rely upon the following portion of 28 U.S.C. § 1257:

> "Final Judgment or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * * of the United States * * * ."

(c) *The Questions presented for Review are:*

1. May a State require that a person register at least fifty-four days before an election in order to be entitled to vote at that election where the legislature in submitting to the voters an amendment to the State Constitution so providing, and the voters in adopting that amendment found that it was necessary and served a compelling state interest?

2. Is the above requirement valid as to persons who reside in the county more than fifty-four days before an election and who could register more than that time prior to the election?

3. As to persons who could register fifty-four days before an election but who fail to do so, is it necessary, in order to uphold the requirement as to them, to demonstrate a compelling state interest?

(d) *Constitutional Provisions and Statutes which this Case Involves.*

The material portion of Section 1 of Article II of the Constitution of the State of California reads:

> "Sec. 1. Every native citizen of the United States of America, every person who shall have acquired the rights of citizenship under and by virtue of the Treaty of Queretaro, and every naturalized citizen thereof who shall have become such 90 days prior to any election, of the age of 21 years, who shall have been a resident of the State one year next preceding the day of the election, and of the county in which he or she claims his or her vote 90 days, and in the election precinct 54 days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law, provided, any person duly registered in one precinct and removing therefrom to another precinct in the same county within fifty-four days, or any person duly registered as an elector in any county in California and removing therefrom to another county in California within 90 days prior to an election, shall for the purpose of such elec-

tion be deemed to be a resident and qualified elector of the precinct or county from which he so removed until after such election; * * * "

Section 203 of the Elections Code reads:

"203. Registration of electors shall be in progress at all times except during the 53 days immediately preceding any election, when registration shall cease for that election as to electors residing in the territory within which the election is to be held. Transfers of registration for an election may be made from one precinct to another precinct in the same county at any time when registration is in progress in the precinct to which the elector seeks to transfer."

Other pertinent provisions of the Elections Code will be quoted hereafter in our argument on the merits.

The respondents (petitioners below) sought a peremptory writ of mandate pursuant to the following portion of Section 10 of Article VI of the State Constitution:

"Sec. 10. The Supreme court, courts of appeal * * * have original jurisdiction * * * in proceedings for extraordinary relief in the nature of mandamus * * * ."

They also relied upon the following portion of Section 1085 of the Code of Civil Procedure which, as to a writ of mandamus provided:

"1085. It may be issued by any court, except a municipal or justice court, to any inferior tribunal,

corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station * * * ."

Also cited by respondents was Section 6403 of the Elections Code the material portions of which read:

"6403. Whenever it is made to appear by affidavit to the Supreme Court * * * that any wrongful act has been or is about to be done by any person charged with any duty concerning the primary election, or that any neglect of duty has occurred or is about to occur, the court shall order the officer or person charged with the error, wrong or neglect forthwith to correct the error, desist from the wrongful act or perform the duty, or show cause why he should not do so. * * * "

(c) *Statement of the Case.*

It is agreed by all parties that respondents' petition to the Supreme Court of California for a writ of mandate properly presented the question as to the constitutionality under the Fourteenth Amendment to the Constitution of the United States of the requirement of ninety days residency in the county and fifty-four days residency in the election precinct in order to vote, also the constitutionality of Section 203 of the Elections Code which provides in relevant part that:

"203. Registration of electors shall be in progress at all times except during the 53 days immediately preceding any election, when registra-

tion shall cease for that election as to electors residing in the territory within which the election is to be held. * * * "

The State Supreme Court held that all three requirements were unconstitutional insofar as they exceeded twenty-nine days and said (App. pp. 14-15 7 Cal.3d at p. 28, 101 Cal.Rptr. at p. 540, 496 P.2d at p. 452):

> "Finally, we have determined that the changes in election procedures which we now announce need not be put in effect for the June 1972 primary, but must be enforced at the November 1972 general election. * * * Too little time remains before the June primary to permit the county clerks to implement these changes in orderly fashion, and an order compelling hasty action could well result in needless confusion. * * *
>
> "It follows that petitioners are not entitled to the relief prayed for with respect to the June 1972 primary. Since there is no reason to believe that any of the parties to this proceeding will not accede to our holding herein, no purpose would be served by issuing a writ of mandate to compel such compliance with respect to the November 1972 general election. * * * For this reason, the petition for peremptory writ is denied. * * * "

(f) *When Federal Question First was Raised.*

This case was initiated by the respondents (petitioners below) when they filed their original proceedings in the State Supreme Court. They raised the

Federal Question in both their petition and in their Points and Authorities attached thereto.

(g) *Amplification of Reasons for Allowance of Writ.*

I

THIS CASE INVOLVES IMPORTANT QUESTIONS OF LAW OF NATIONWIDE IMPACT.

We seek, by this petition, a review of only that part of the decision of the State Supreme Court which held invalid Section 203 of the Elections Code. We do not seek review of the determination that the ninety and fifty-four days residency required by Article II Section 1 of the State Constitution are invalid (except as to any review of the 53 day residency requirement may be material to the discussion of Section 203 of the Elections Code).

Both the State Supreme Court and the respondents rely upon *Dunn v. Blumstein* (1972) 405 U.S. 330.[1]

In that case this Court held invalid a residency requirement longer than the time between the close of registration and the election which, in that case was thirty days. As we read the opinion this Court did not say that the residency requirement cannot exceed thirty days in states with an earlier close of registration. Mr.

[1] 92 S.Ct. 995, 31 L.Ed.2d 274.

Justice Blackmun in a concurring opinion at page 363[2] said:

> " * * * I see no constitutional imperative that voting requirements be the same in each state, or even that a State's time requirement relate to the 30-day measure imposed by Congress by 42 U.S.C. § 1973aa-1 (d) for presidential elections. * * *
>
> " * * * It is, of course, a matter of line drawing, as the Court concedes, *ante,* at 348. But if 30 days pass constitutional muster, what of 35 or 45 or 75? The resolution of these longer measures, less than those today struck down, the Court leaves, I suspect, to the future."

The state Supreme Court recognized this when it said (App. p. 6-7, 7 Cal.3d at p. 23, 101 Cal.Rptr. at p. 537, 496 P.2d at p. 449):

> " * * * It is true that the Supreme Court has in fact not adjudicated the constitutionality of any period shorter than 90 days. * * * "

The question which we seek reviewed, therefore, has not been decided by this Court making applicable (a) of 1 of Rule 19:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this Court * * * ."

The respondents chose to sue only the county clerks of two of the smaller counties of the State of Cali-

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[2] 92 S.Ct. at p. ....., 31 L.Ed.2d at page 296.

fornia, Marin and Monterey,[3] but the effect of the decision as *stare decisis* is statewide affecting all counties, including, for example the County of Los Angeles with a population of 7,032,075.

Attached to the return in the State Supreme Court of the petitioner Ernest A. Maggini is a statement under penalty of perjury[4] of James S. Allison, Registrar-Recorder of the County of Los Angeles in which he says, in part:

> "For the 1968 primary election, over 350,000 affidavits of voter registration were received by the Registrar-Recorder during the last twenty-four days of the registration period for that election. That was as many affidavits of registration as were received during the entire year preceding said election. This illustrates the degree to which people procrastinate in registering to vote. There is no reason to think that the extension by twenty-four days of the registration period for an election, would reduce procrastination on the part of voting registrants.
>
> "This procrastination factor, coupled with the eighteen through twenty-year-old franchise, requires my office to plan on the basis that some 500,000 affidavits of voter registration could be received in the period between the fifty-fourth day and the thirtieth day prior to the 1972 primary election. Since each affidavit has an original and

[3]The population of the County of Marin is 206,038, that of the County of Monterey 250,071. Cal.Gov't. Code §28020.

[4]In California, such a statement has the same effect as an affidavit. Code of Civil Procedure, Section 2015.5 as amended by Cal.Stats. 1963, ch. 2080, p. 4346.

a duplicate copy, there could be 1,000,000 pieces of paper being sorted into both alphabetical order and precinct order and filed by the Registrar-Recorder of the County of Los Angeles during the last few weeks before the election, much of it to be done within less than thirty days of the election.

"In California, sample ballots must be mailed to registered voters prior to an election, and precinct indexes must be prepared for use by officials at the polling places on election day. To be sure that a majority of the more than three million voters in the County of Los Angeles would receive sample ballots in time for the election, it would almost certainly be necessary to mail them out in two cycles: the first, for voters whose affidavits of registration were on file as of approximately fifty-four days before the election; and the second, for voters whose affidavits were received during the remaining registration period, including those who had moved to other precincts, changed party affiliation, or newly registered. Precinct indexes would probably also have to be printed in two cycles, so that each of the County's 7,500 precincts would at least be assured of having the means to identify a majority of its eligible voters at the precinct on election day. To rely on one last-minute mailing of sample ballots, precinct indexes or both, would not allow enough safety margin against printing delays, mailing delays or other accidents.

"The security, accuracy and the validity of the voter registration files would be very difficult to maintain. The affidavit books would be sent out to precincts with approximately 350,000 affidavits

which are no longer current. Under the present data processing system used by the Registrar-Recorder, there is no way that a cancellation notice could be sent to the precinct inspectors. * * *

"Several key divisions within the Registrar-Recorder would have peak workload periods piled up on top of each other instead of following one another as happens with the 54-day close. One of these divisions handles affidavit processing and absent voter ballot requests. Another of these divisions mails the sample ballots and prepares all the precinct supplies sent out to the polling places.

"With currently available supervision and quality control standards, the 500,000 second mailing sample ballots could not begin being delivered to the post office until 5 days before the election. This is too late for voters to be informed of their right to apply for an absent voter ballot.

"For the people whose affidavits are received after the 54 day 'cutoff,' some type of voter indentification would have to be sent out to the precincts. This means producing a great many photocopies of the original affidavits so that the voter's signature could be compared by the precinct board.

"The impact of these additional administrative and technical problems on the voters of the County, is that as many as 500,000 of them might not receive their sample ballots in time for the election, and might find, when they reach their respective polling places on election day, that there are no records to identify them as being entitled to vote there."

II

THIS COURT HAS JURISDICTION TO REVIEW THE HOLDING OF THE STATE SUPREME COURT.

As shown, *supra* page 6 the State Supreme Court refused to issue the requested writ of mandate. Appendix p. 15, 7 Cal.3d at p. 29, 101 Cal.Rptr. 533 at p. 541, 496 P.2d at p. 453. It may be contended that since the requested relief was denied the petitioners won and there is no judgment of which they may seek review. If this contention should be sustained it would mean that in order to seek review some county clerk, registrar of voters, or registrar-recorder would have to deny registration to some one applying less than fifty-four but more than twenty-nine days prior to the election. The would-be registrant would then bring a new action in the State Supreme Court and the county clerk or other officer would make it clear in his return that he would not follow the opinion of the State Supreme Court unless a writ is issued. We submit that the law does not require such a useless act. In practical effect, if not technically, the opinion of the State Supreme Court orders registration of voters up to twenty-nine days before the election.

Both *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 87 Cal.Rptr. 839, 471 P.2d 487 and *Alhambra City School District v. Mize* (1970) 2 Cal.3d 806, 87 Cal.Rptr. 867, 471 P.2d 515, were original proceedings in which writs of mandate were demanded to require the defendants to process bond issues both of which had obtained a

majority vote but less than a two-thirds vote. In both cases the state Supreme Court said that Section 40 of Article XIII of the State Constitution which required a two-thirds vote was unconstitutional as in violation of the 'one man, one vote' requirement but refused to grant the writs demanded since it declined to make its opinions retroactive. The Alhambra City School District filed a notice of appeal and in its jurisdictional statement in Footnote 11 at the bottom of page 11 said:

> "11. In these *original* proceedings the State Supreme Court has no jurisdiction to give declaratory judgments but only to grant or deny the petitions for writs of mandamus. Since the writs were denied that portion of the opinion holding the two-thirds requirement unconstitutional was, necessarily, dictum."

Nevertheless both defendants filed petitions for writs of certiorari, both of which were granted and both judgments (or opinions) reversed on the authority of *Gordon v. Lance* (1970) 403 U.S. 1[5]; *Mihaly v. Westbrook* (1971) 403 U.S. 915[6]; *Mize v. Alhambra City School District* (1971) 403 U.S. 927.[7]

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[5]91 S.Ct. 1889, 29 L.Ed.2d 273.
[6]91 S.Ct. 2224, 29 L.Ed.2d 692.
[7]91 S.Ct. 2244, 29 L.Ed.2d 706.

III

THE FIFTY-FOUR DAY CLOSE OF REGISTRATION IS NECESSITATED BY A COMPELLING STATE INTEREST.

We refer to the statement of James S. Allison, *supra* pp. 9-11.

The State Supreme Court says (App. p. 9, 7 Cal. 3d at p. 25, 101 Cal.Rptr. at p. 538, 496 P.2d at p. 450):

> "Respondents next point to section 10009, which directs the county clerk to prepare sample ballots listing the names of the candidates for the various offices at least 25 days before the election, and to mail such ballots to the registered voters not more than 40 nor less than 5 days before the election. Also included in the latter mailing, we add, are the 'voter's pamphlet' containing the statements of personal qualifications furnished by the candidates (§ 10012.5) and the 'ballot pamphlet' containing the text of any measures submitted directly to the voters by the Legislature or by initiative or referendum, their analysis by public counsel, and any written arguments for or against such measures (§§ 3558-3574).
>
> "The purpose of these statutes — to promote a more informed electorate — is doubtless commendable. But voter education is by no means the responsibility of the state alone. * * * In view of the broad exposure of the voting public to both information and persuasion bearing on the candidates and issues via the newspapers, radio and television, particularly during the final month of

each political campaign, we cannot hold that the mailing of the above described materials is a compelling governmental interest within the meaning of *Dunn.* * * * "

We submit that sample ballots and ballot pamphlets are of far greater importance than given to them by the State Supreme Court. For example, on November 8, 1966 the following proposition was submitted to the voters:

"TAXATION: INSURANCE COMPANIES: HOME OR PRINCIPAL OFFICE DEDUCTION. *Legislative Constitutional Amendment.* Establishes formula and limits amount of real property taxes on home or principal office buildings deductible from gross premiums tax by foreign insurers immediately, and by domestic insurers on home or principal office buildings commenced after January 1, 1970. Redefines term 'insurer' so that reciprocal or interinsurance exchanges together with their attorneys in fact be considered as single unit."

This was analyzed on page 13 of the voters' pamphlet by the Legislative Counsel and arguments both for and against also appeared. How much aid was given to the voters "via the newspapers, radio and television"?

Both the legislature and the voters have found that the fifty-four period is necessary. By Resolution Chapter 124, Stats. 1947 page 3619 the legislature submitted to the voters Assembly Constitutional Amendment No.

32 at the November, 1948 election to amend Section 1 of Article II of the State Constitution to increase the period of required residence in the precinct from forty to fifty-four days. The argument to the voters on page 7 of the voters pamphlet read, in part:

> "The purpose of the amendment is to allow more time for preparation for the election. Since the present law was established in 1930, there has been an average of 100% increase in number of voters. County Clerks and the Registrar of Voters now have special employees preparing the necessary voting lists, mailing sample-ballots, notices of elections and arguments. They are forced to work around the clock to meet the deadline. Errors caused by such conditions may deprive a citizen of his right to vote. It is expected these conditions will be aggravated when housing conditions permit more changes of address."

The amendment was adopted by the People. Both the legislature in submitting A.C.A. and the people in adopting it, found that in 1948 fifty-four days were necessary.

In *Alabama State Federation of Labor v. McAdory* (1944) 325 U.S. 450 a state statute was attacked as a violation of the right of free speech. At page 456[8] this Court said:

> "When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part. * * * "

[8] 65 S.Ct. 1384 at 1392, 89 L.Ed. 1725 at 1737.

It is submitted, therefore, that the statements in the argument to the voters must be presumed to be true.

Since 1948 population has greatly increased and the number of persons eligible to vote has increased in greater proportion than has the population.

IV

THE RIGHT TO VOTE IS NOT DENIED TO THOSE WHO RESIDE IN THE PRECINCT MORE THAN FIFTY-FOUR DAYS BUT WHO FAIL TO REGISTER.

It may be conceded that a person who first moves into a county less than fifty-four days before an election is denied the right to vote in that election. As to him Section 203 of the Elections Code becomes a residency requirement.[9] The state Supreme Court, however, does not confine its invalidation of the fifty-four day requirement to such persons but holds it invalid as to all electors no matter how long they have resided in the precinct. We submit that even if it be held that one first moving into the county more than twenty-nine but less than fifty-four days before an election cannot be denied the vote, the invalidation of Section

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[9]However if he has registered elsewhere in the state he can vote at his former address and is only denied the right to vote on the local issues which apply to his new residence. Art. II, Sec. 1, Constitution of California which provides:

"* * * any person duly registered as an elector in one precinct and removing therefrom to another precinct in the same county within fifty-four days, or any person duly registered as an elector in any county in California and removing therefrom to another county in California within ninety days prior to an election, shall for the purpose of such election be deemed to be a resident and qualified elector of the precinct or county from which he so removed until after such election; * * *."

203 of the Elections Code should be confined to persons in his situation. If a person who can register fifty-four days before an election fails to do so, it is not Section 203 of the Elections Code which denies him the vote but his own act. At page 22 of their Points and Authorities in the State Court respondents said:

> " * * * As a result, the weakly motivated voter, the person who does not consider voting until the heat of the campaign awakens his concern, is precluded from voting in California elections; because by the time his interest is ignited the opportunity to register has long since passed."

In that case his inability to register is not due to the restrictions of Section 203 of the Elections Code but to his own indolence and procrastination.

> "If the voter is given a reasonable opportunity to register, he is not in a position to complain that any of his constitutional rights have been violated. * * * "
>
> *Blue v. State* (1934) 206 Ind. 98, 188 N.E. 583 at 586, 91 A.L.R. 334 at 340.

In Calfornia every effort has been made to facilitate registration. Sections 201, 202, 204, 205.5, 213, 213.1 and 223 of the Elections Code read, respectfully:

> "201. It is the intent of the Legislature that the election board of each county, in connection with the registration of voters and in order to promote and encourage voter registrations, shall establish a sufficient number of registration places

throughout the county, and outside the county courthouse, for the convenience of persons desiring to register, to the end that registration may be maintained at a high level.

"It is also the intent of the Legislature that county clerks, in order to promote and encourage voter registrations, shall enlist the support and cooperation of interested citizens and organizations, and shall deputize as registrars qualified citizens in such a way as to cover most effectively every section of the county. The persons so deputized shall be permitted to register voters anywhere within the county, and the county clerk shall not deny deputy registrars the right to register voters anywhere in the county.

"In furtherance of the purposes of this section, the governing board of any county, city, city and county, district, or other public agency, may authorize and assign any of its officers or employees to become deputy registrars of voters and to register qualified citizens on any premises and facilities owned or controlled by such public agencies during the regular working hours of such officers or employees; provided that with the exception of firemen, any compensation to which said officer or employee may be entitled to in payment for the services of such officer or employee as a deputy registrar may be paid by the authority which appointed such officer or employee as a deputy registrar to the public agency which regularly employs such officer or employee.

"202. The county clerk of the county in which the elector resides or claims residence may take

the affidavit of registration in any adjoining county.

"204. The election board of each county may provide by resolution for the registration of electors in their respective precincts by the county clerk. The election board may also provide by resolution for the registration of electors at specified times and places, other than the office of the county clerk, which are most convenient to large numbers of electors, without reference to respective or particular precincts.

"205.5. Any person who is an elector qualifies for appointment as a deputy registrar of voters.

"213. Any elector absent from the county in which he claims residence may make an affidavit of registration, which shall be in duplicate, before any judge or clerk of any court of record, or notary public, or, if in a foreign country, before any minister, consul or vice consul of the United States, or, if a member of the armed forces, before any commissioned officer of the armed forces of the United States. The affidavit and duplicate shall be returned to the county clerk of the county in which he claims to be an elector, by registered or certified mail wherever possible. The county clerk shall furnish the necessary blank forms of affidavit of registration, in duplicate, to each elector applying therefor in writing and showing that he will be temporarily absent from his home county. Upon receipt by the county clerk, the affidavit shall be arranged and bound and the duplicate shall be filed as required by this chapter.

"213.1. The county clerk of any county in this state may take the affidavit of registration of any elector who resides or claims residence in another county in this state if it is within seven days prior to the close of registration for any statewide primary or general election, and the elector will not have sufficient time to either return to his county of residence to register or write for registration by mail before the close of registration for the election. The affidavit shall be forwarded to the county clerk of the county in which the elector resides. The county clerk of the county in which the elector resides may use the affidavit of registration from the other county as his permanent record or may copy the information from the affidavit or registration on to the form used in his county and in this instance shall forward the copied form to the elector for signature. If the information from the affidavit of registration is copied on to the form used in his county, the county clerk shall immediately mail the copied form to the elector for his signature. The signature shall not need verification other than comparison by the county clerk on return. The copied form shall be accompanied by a postage prepaid self-addressed envelope for the return of the affidavit. The original affidavit of registration shall serve to qualify the elector to vote in subsequent elections until the return of the copied form. The copied form shall, in all respects, serve as a valid affidavit of registration taken in the county in which the elector resides.

"223. No county clerk may refuse to deputize any person to register voters because of race, creed, color, or national origin or ancestry."

At the top of page 25, lines 2-5, respondents in their Points and Authorities in the state court said:

> " '[T]here must be other effective safeguards against fraud than . . . to close registration at a time when those desiring to register do not even know for sure who the candidates are and what the issues might be.' 321 F.Supp. at 1107."

It is submitted that everyone who is eligible to vote at an election has a moral duty to do so, although it is not required by law. Even if there should be a situation, however, where a voter would be justified in not exercising his right of franchise there is no reason why he should not register. A person who has registered to vote is not compelled to vote. Therefore there is no excuse whatever for failure to register.

Since the registration of persons who can be registered fifty-four days or more before an election has been facilitated in every possible way and every conceivable obstacle removed Section 203 of the Elections Code does not deny or even impair the right of such person to vote. To uphold Section 203 as to such persons there should be no necessity to demonstrate a compelling state interest. Although as we have shown, there is a compelling state interest, mere administrative convenience should be sufficient.

(j) The opinion of the State Supreme Court, printed as an Appendix, constitutes the judgment of the court and was entered May 4, 1972.

Respectfully submitted,

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APPENDIX

Opinion entered May 4, 1972, reported in 7 Cal.3d 18, 101 Cal.Rptr. 533, 496 P.2d 445.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

JEFFREY A. YOUNG et al., Petitioners,	)	
vs.	)	S.F.
GEORGE H. GNOSS, as County Clerk, etc., et al., Respondents.	)	22888

This proceeding for writ of mandate challenges the constitutionality of the provisions of California law which impose durational residence requirements of 90 days in the county and 54 days in the precinct as a prerequisite to voting in this state,[1] and which close the voter registration books 54 days before an election.[2] As will appear, we have concluded that the cited provisions violate the equal protection clause of the Four-

[1]Article II, section 1, of the California Constitution declares that the right of suffrage may be exercised by every citizen who, inter alia, on the date of the election shall have been a resident "of the county in which he or she claims his or her vote ninety days, and in the election precinct fifty-four days . .. . "

[2]Elections Code section 203 provides in relevant part that "Registration of electors shall be in progress at all times except during the 53 days immediately preceding any election, when registration shall cease for that election as to electors residing in the territory within which the election is to be held." Unless otherwise indicated, all statutory references in this opinion are to the Elections Code.

teenth Amendment as applied in Dunn v. Blumstein (1972) 405 U.S. 330 [92 S.Ct. 995, 31 L.Ed. 2d 274], but that petitioners are not entitled to relief at this time.

Petitioner Young established his present residence in Marin County, California, on March 10, 1972. Prior to that date he was a resident of Iowa. He applied to register to vote in Marin County in the primary election to be held on June 6, 1972. He was refused registration by respondent Gnoss, the Marin County Clerk, on the sole ground that he could not comply with the 90-day residence requirement.[3]

At the time of filing the petition, petitioner Isaac was a resident of Texas intending to establish a new permanent residence in Monterey County, California, no later than May 1, 1972. Through her counsel petitioner inquired of respondent Maggini, the Monterey County Clerk, whether she would be permitted at that time to register to vote in Monterey County in the June primary election. Respondent replied in the negative, basing his refusal on the fact that petitioner would then be unable to comply with the 54-day residence requirement and the corresponding period for closing of registration.[4]

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[3]The 90-day period began in this case on March 8, 1972.

[4]The 54-day period began on April 14, 1972. The petition was not premature as to Isaac: although as a general rule mandate will not lie in the absence of a present duty to act, the remedy may be sought when it is clear from the circumstances that the public officer does not intend to comply with his obligation when the time for performance arrives. (Imperial Mut. L. Ins. Co. v. Caminetti (1943) 59 Cal.App.2d 494. 497-498.)

The remaining petitioners are three nonprofit organizations which assert that the right to vote and the right to travel of numerous individuals among their membership is or will be denied or abridged by reason of the enforcement or threat or enforcement of the provisions of law here challenged.[5]

Petitioners invoke the original jurisdiction of this court, and seek relief by writ of mandate. For the reasons stated in Jolicoeur v. Mihaly (1971) 5 Cal.3d 565, 570, fns. 1 and 2, the case falls within the limited category in which we deem it proper to exercise original jurisdiction, and the prayer is for the appropriate remedy. (Accord, Wenke v. Hitchcock (1972) 6 Cal.3d 746, 750-751.)

The restrictions placed on the right of suffrage by article II, section 1, of the California Constitution have more than once failed to survive judicial scrutiny. In Otsuka v. Hite (1966) 64 Cal.2d 596, we held that the section's disenfranchisement of all persons convicted of "infamous crimes" can constitutionally be applied only to those guilty of offenses which actually evidence corruption or dishonesty. In Castro v. State of California (1970) 2 Cal.3d 223, we held that the section's exclusion from voting of all persons unable to "read the Constitution in the English language" cannot constitutionally be invoked against those who are fully literate in another tongue and have access to

[5]Although not named as such in the petition, we deem the California Secretary of State to be a proper party respondent to this proceeding, and shall treat him accordingly. The Secretary of State has stipulated that he may be joined as such a party, and has waived service of process.

substantial sources of political information in that language. And in Keane v. Mihaly (1970) 11 Cal.App. 3d 1037, the Court of Appeal struck down on equal protection grounds the section's limitation of the franchise to persons who have resided in this state for one year prior to election day. We approve of *Keane,* and now turn to the question whether the remaining durational residence requirements of article II, section 1, can withstand constitutional analysis.

The United States Supreme Court recently addressed itself to this issue in Dunn v. Blumstein (1972) supra, 405 U.S. 330 [92 S.Ct. 995, 31 L.Ed. 2d 274]. There a new resident of Tennessee challenged the jurisdiction's requirements that a voter be a resident of the state for one year and the county for 90 days in order to exercise the suffrage. The court first observed that durational residence requirements both affect the fundamental right to vote by completely excluding certain citizens from the franchise, and create a suspect classification of those citizens who lose that right merely because they have recently exercised their additional right to travel within the United States. (92 S.Ct. at pp. 999-1003.) For these reasons, the court ruled, durational residence requirements must be judged by the "strict" equal protection test, i.e., by the now-settled principle (see cases collected in Castro v. State of California, supra, 2 Cal. 3d at pp. 234-236) that a state law which operates to deny the franchise to a protion of its citizens violates the equal protection clause unless the state can demonstrate that it promotes a

compelling governmental interest and is necessary in the sense that it is the least burdensome means available to achieve that goal. (92 S.Ct. at p. 1003.)

The high court then reviewed two interests claimed to justify durational residence requirements—the prevention of electoral fraud and the informed use of the ballot by voters knowledgeable about the issues. The court agreed that preventing electoral fraud is a compelling governmental interest (see also Otsuka v. Hite (1966) supra, 64 Cal.2d 596, 603), but held that a durational residence requirement is not a necessary means of achieving it. That purpose is adequately served, the court explained, by the oath requirement of the state's voter registration system, coupled with the threat of prosecution for violation of penal statutes prohibiting voter fraud. (*Id.* at pp. 1004-1009.)

Secondly, the court acknowledged it may well be true that new residents as a group know less about state and local issues than old residents, but held that a durational residence requirement is much too crude a tool for insuring that knowledge among all voters: "The classifications created by durational residence requirements obviously permit any long-time resident to vote regardless of his knowledge of the issues—and obviously many long-time residents do not have any. On the other hand, the classifications bar from the franchise many other, admittedly new, residents who have become minimally, and often fully, informed about the issues. Indeed, recent migrants who take the

time to register and vote shortly after moving are likely to be those citizens . . . who make it a point to be informed and knowledgeable about the issues. Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is 'necessary' to reside for a year in the State and three months in the county in order to be minimally knowledgeable about congressional, state or even purely local elections." (Fn. omitted.) (*Id.* at p. 1011.)

Accordingly, the high court affirmed a ruling of a three-judge federal panel holding unconstitutional the one-year and 90-day residence requirements challenged in *Dunn*.

We are bound, of course, by this decision of the United State Supreme Court. The 90-day residence requirement of article II, section 1, of our Constitution is indistinguishable in purpose and effect from the 90-day period invalidated in *Dunn;* for the reasons there stated, that requirement is unconstitutional.[6]

A more difficult question is presented by the 54-day residence requirement and parallel closing date of the registration books. It is true that the Supreme Court has in fact not yet adjudicated the constitu-

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[6]On April 6, 1972, the Secretary of State drew the same conclusion and so advised all county clerks and registrars of voters in California.

tionality of any period shorter than 90 days.[7] But it is well to remember that in *Dunn* the court declared that the "strict" equal protection test must be applied not just to the one-year and 90-day periods there in issue, but to all such durational restrictions on the right of suffrage. (92 S.Ct. at p. 1003.) Respondents' burden, accordingly, is to show that the 54-day period prescribed by California law is necessary to promote a compelling governmental interest.

No claim is made that the 54-day period serves the purpose of preventing fraud by permitting election officials to go behind the prospective voter's oath and determine the bona fides of his asserted residence.[8] Nor is it contended the 54-day period is required to insure that the prospective voter will have resided in the community long enough to have become acquainted with local issues (cf. Bourland v. Hildreth (1864) 26 Cal. 161, 179). In fact, respondents and amici curiae are not essentially concerned with the 54-day *residence* requirement of article II, section 1, of the Constitution, but with the core provision (§ 203) closing *registration* 54 days before an election. Were it not for that period, they argue, it would be physically impossible for them to discharge certain pre-election duties imposed by other sections of the code. Stating the point conversely,

[7]On April 3, 1972, the Supreme Court took summary action in 10 cases presenting issues similar to *Dunn*, affirming 7 and vacating 3 for further consideration in the light of that decision. (405 U.S. 330 [40 U.S.L. Week 3479, 3483].) None of the cases involved a durational residence requirement of less than 90 days, however.

[8]In any event, the *Dunn* opinion convincingly demonstrates that durational residence requirements would provide no real protection against such fraud. (92 S. Ct. at p. 1005.)

the Secretary of State asserts that "The 54-day registration cut-off does not appear to be an administrative necessity in California, so long as local officials are relieved of certain mechanical requirements with respect to those voters who register after the 54th day prior to an election."[9] We therefore inquire into the substance of those "mechanical requirements."

The first group of statutes relied on by respondents directs the county clerk to furnish lists of registered voters and affidavit information to the Secretary of State and to political parties within a specified number of days before the election.[10] In Silver v. Brown (1965) 63 Cal.2d 270, 277, we explained that "No reason appears, however, why inability to comply with section 6460 would interfere with the orderly conduct of the primary and general elections. Its purpose is merely to provide general electoral information." The

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[9]The same view is expressed in a declaration filed by William N. Durley, Sacramento County Clerk, who also identifies himself as a director of the County Clerks' Association of California and cochairman of the Elections Legislative Committee of that association.

[10]Section 6460 provides that 35 days before the election a statement of the number of voters in each county, together with their party affiliations, shall be transmitted to the Secretary of the State. The Secretary of State shall compile these statements into a statewide list available to any elector upon request.

Sections 456.5 and 456.6 provide that 30 days before the election a copy of the index of registered voters or the data-processing tape file containing that information shall be transmitted to the Secretary of State. The Secretary of State may make that information available to any person for election or governmental purposes.

Section 459 provides that 30 days before the election a copy of the tabulating cards or data-processing tape containing the information set forth in the affidavits of voter registration shall upon demand be furnished to the county central committee of any political party participating in the election.

Section 455 provides that 25 days before the election copies of the index of registered voters shall be furnished upon demand to the state or county central committees of such political parties. (See also § 454.)

same is obviously true of sections 456.5 and 456.6. The fact that such information is made available to "any person" suggests, of course, that an additional purpose is to facilitate its use by candidates or political parties. The latter purpose is clearly evident in sections 455 and 459, which in effect furnish political parties with current names and addresses of all registered voters in each constituency. This information permits the parties to canvass the voters by mail or personal contact in order to influence their choices in the forthcoming election. We easily perceive the interest of the political parties in obtaining such information. But we cannot hold that interest so essential to the conduct of the election that it justifies cutting short the registration process and thereby depriving would-be voters of their right of suffrage. It is not, in short, a compelling governmental interest within the meaning of *Dunn*.

Respondents next point to section 10009, which directs the county clerk to prepare sample ballots listing the names of the candidates for the various offices at least 25 days before the election, and to mail such ballots to the registered voters not more than 40 nor less than 5 days before the election. Also included in the latter mailing, we add, are the "voter's pamphlet" containing the statements of personal qualifications furnished by the candidates (§ 10012.5) and the "ballot pamphlet" containing the text of any measures submitted directly to the voters by the Legislature or by initiative or referendum, their analysis by public coun-

sel, and any written arguments for or against such measures (§§3558-3574).

The purpose of these statutes—to promote a more informed electorate—is doubtless commendable. But voter education is by no means the responsibility of the state alone. In Castro v. State of California (1970) supra, 2 Cal.3d 223, 242, we specifically rejected the proposition that "the state must not only provide all qualified citizens with an equivalent opportunity to exercise their right to vote, but must also provide perfect conditions under which such right is exercised. The equal protection clause does not require, for example, that California provide explanatory material (see Elec. Code, §3566) of varying degrees of complexity and sophistication even though the ability to comprehend an analysis of a technical ballot measure may vary widely among voters."[11] In view of the broad exposure of the voting public to both information and persuasion bearing on the candidates and the issues via the newspapers, radio and television, particularly during the final month of each political campaign, we cannot hold that the mailing of the above-described materials is a compelling governmental interest within the meaning of *Dunn*.[12]

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[11]Indeed, there may be constitutional limits to the degree to which a state may concern itself with how "knowledgeable" its prospective voters are. The Supreme Court declined to decide that issue in *Dunn*, but did point out that by prohibiting voting tests in the 1970 Voting Rights Act "Congress declared federal policy that people should be allowed to vote even if they were not well informed about the issues." (92 S.Ct. at p. 1010, fn. 29.)

[12]We note petitioners' assertion that few other states similarly furnish elaborate ballot materials to their electorate or current lists of voter registration to their political parties (see fn. 10, *ante*).

Thirdly, respondents stress that under section 14002, subdivisions (a) and (b), the county clerks are required to provide local election officials with the original affidavits of registration and printed copies of the indexes of registered voters in each precinct. Such documents are needed, of course, to identify each prospective voter as he presents himself at the polls. Their timely delivery to the precinct officials is therefore essential to the conduct of the election, and constitutes a compelling governmental interest. But the question remains whether the closing of registration 54 days before the election is necessary to achieve that goal.

No such showing is here made. We observe, rather, that in distinction to the other statutes discussed above, section 14002 prescribes no minimum pre-election period within which it must be obeyed. Greater flexibility, therefore, may be permitted in complying with its terms. For example, if an influx of registrations after the 54th day prior to the election were to render impractical the schedule heretofore followed, nothing in the statute would prevent the county clerks from delivering the affidavit books and voter indexes in two cycles—.ie., the first covering the voters whose affidavits were on file 54 days before the election, and the second for those whose affidavits were received during the remaining registration period. We recognize that the volume of registrations usually increases as the end of that period approaches, but the evidence before us indicates that the second group of voters

would nevertheless remain a relatively small percentage of the first.[18] Accordingly, to cut off all registration 54 days before the election in order to facilitate compliance with section 14002 is *not* the method which is the least burdensome on the exercise of the right of suffrage within the meaning of *Dunn*.

We conclude that both the 54-day residence requirement of article II, section 1, of the Constitution and the parallel closing date for voter registration prescribed by Elections Code section 203 violate equal protection clause of the Fourteenth Amendment.

We turn to the question of remedy. The parties have submitted a number of plans to this court. They suggest a variety of alternative closing dates for voter registration, and propose elaborate provisions for solving the different administrative problems assertedly caused by each of those dates. But to adopt any of the proposed solutions—or to devise still another response to the administrative difficulties in question—is a matter for the legislative branch of the government. Our function at this time is simply to declare the minimum that must be done to implement Dunn v. Blumstein.

In *Dunn* the Supreme Court, having struck down Tennessee's durational residence requirements of one year and 90 days, concluded that a period of 30 days

[18]For example, Professor Edmond Costantini, Chairman of the Department of Political Science at the University of California at Davis and specialist in the field of voting patterns and the effect on registration of durational residence requirements, states by affidavit that if registration were to remain open an additional 24 days (i.e., until 30 days before the election), the number of registered voters in California would increase by 2½ percent.

should be ample to permit the state to complete its administrative tasks prior to elections. (92 S.Ct. at p. 1006.) We concur in that figure.[14] By parity of reasoning, we hold that in California no durational residence requirement in excess of 30 days may constitutionally be imposed, and general voter registration must remain open at all times except during the 29 days immediately preceding an election.[15] Furthermore, the ancillary statutes imposing pre-election duties on county clerks which we here hold are not compelling governmental interests within the meaning of *Dunn*[16] must give way before these constitutional imperatives: to the extent that such statutes cannot as a practical matter be fully complied with within the 30-day period

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[14]There is additional persuasive authority for the figure of 30 days. As the Supreme Court emphasized in *Dunn*, "In § 202 of the 1970 Federal Voting Rights Act, Congress outlawed state durational residence requirements for presidential and vice presidental elections, and prohibited the States from closing registration more than 30 days before such elections. 42 U.S.C. § 1973aa-1. In doing so, it made a specific finding that durational residence requirements and more restrictive registration practices do 'not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.' 42 U.S.C. § 1973aa-1(a)(6). We upheld this portion of the Federal Voting Rights Act in Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1971)." (92 S.Ct. at p. 1004; see also *id.* at p. 1006, fn. 19.) We note that the precise language of the federal statute (42 U.S.C. § 1973aa-1, subd. (d)) prohibits the states from closing registration "later than thirty days" before election, thereby requiring that registration remain open to and including the 30th day. Some years earlier a presidential commission recommended that in order to minimize the disenfranchising effect of restrictive registration procedures, voter registration should cotinue as long as possible and should not end more than "three or four weeks" before election day. (Report of President's Commission on Registration and Voting Participation (1963), p. 12.) Finally, petitioners cite statistical authority for the proposition that in 1968 the average closing date of voter registration across the country was 28 days prior to election.

[15]By "general registration must remain open" we mean that the registration procedures heretofore in use during the period immediately prior to the 54th day before the election must be extended, without change, through the 30th day.

[16]I.e., Elections Code sections 455, 456.5, 456.6, 459, 3573, 6460, 10009, and 10012.5. The analysis also applies to statutes imposing similar duties with respect to elections other than primaries (e.g., § 10012).

prior to election, the county clerks are relieved of the duties in question. Nevertheless, the county clerks should make every reasonable effort to comply with the spirit if not the letter of these statutes, e.g., by mailing registration lists to the political parties and informational materials to the voters in two cycles, as we suggested above in discussing the delivery of affidavit books and voter indexes to local election officials. We recognize that such a two-step process may increase in some respects the cost of conducting elections, but we reiterate that "Avoidance or recoupment of administrative costs, while a valid state concern cannot justify imposition of an otherwise improper classification, especially when, as here, it touches on 'matters close to the core of our constitutional system.' " (Castro v. State of California (1970) supra, 2 Cal.3d 223, 242, and cases cited.)

Finally, we have determined that the changes in election procedures which we now announce need not be put into effect for the June 1972 primary, but must be enforced at the November 1972 general election. "[A] determination that an existing plan of governmental operation denies equal protection does not necessarily require invalidation of past acts undertaken pursuant to that plan or an immediate implementation of a constitutionally valid substitute." (Serrano v. Priest (1971) 5 Cal.3d 584, 619*) Too little time remains before the June primary to permit the county

*Until bound volume 5 appears, this quotation will be found on page 884a of the advance sheets.

clerks to implement these changes in orderly fashion, and an order compelling hasty action could well result in needless confusion. Deferring the changes until the November election, moreover, will give the Legislature the opportunity to address itself to the problem and to adopt whatever measures may be deemed necessary or appropriate to give effect to Dunn v. Blumstein and the decision herein.

It follows that petitioners are not entitled to the relief prayed for with respect to the June 1972 primary. Since there is no reason to believe that any of the parties to this proceeding will not accede to our holdings herein, no purpose would be served by issuing a writ of mandate to compel such compliance with respect to the November 1972 general election. (See Legislature v. Reinecke (1972) 6 Cal.3d 595, 604.) For this reason, the petition for peremptory writ is denied. Petitioners shall not recover their attorneys' fees, but all parties shall recover their costs from the State of California. (See Code Civ. Proc., § 1095.)

MOSK, J.

WE CONCUR:
WRIGHT, C.J.
McCOMB, J.
PETERS, J.
TOBRINER, J.
BURKE, J.
SULLIVAN, J.